No. 97-110

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STEVE BRODEUR AND DR. ALEX ASTORGA, *Petitioners*

v.

TODD LEWIS ASHKER, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Todd Lewis Ashker, herewith submits this opposition to Petitioners, Steve Brodeur and Dr. Alex Astorga's, Petition for Writ of Certiorari, and prays that the Petition for Writ of Certiorari be denied.

QUESTION PRESENTED

1. Does the Eleventh Amendment preclude in Federal Court supplemental jurisdiction over state tort claims against a state official sued in their individual and personal capacities?

2. Does Article 2, Section 3(a) of the United Nations International Covenant on Civil and Political Rights [U.N.T.S. No. 14668, Vol. 999 (1976), p. 171] and the Treaty Supremacy clause [Art. IV, Section 2] preclude forcing a prisoner to divide a federal action under 42 U.S.C. 1983 in the federal court, and to file separate state tort actions against the same officials in state court?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996
NO. 97110

STEVE BRODEUR AND DR. ALEX ASTORGA, *Petitioners*

v.

TODD LEWIS ASHKER, *Respondent*

OPINION OR JUDGMENT BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, *Ashker v. California Department of Corrections*, 112 F.3d 392, (9th Cir. 1997) was issued for publication on April 18, 1997, and has been attached as Exhibit A to the Petition for Writ of Certiorari, and will not be recopied here.

STATEMENT OF JURISDICTION

The Respondent opposes the Petition for Writ of Certiorari. Respondent agrees with the Petitioner's statement that jurisdiction of the Court is available under 28 U.S.C. 1254(1), to review the judgment of the United States Court of Appeals for the

Ninth Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, premised or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Article VI, Section 2 of the United States Constitution provides that "all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land."

TREATY PROVISIONS INVOLVED

The United Nations International Convention on Civil and Political Rights, provides under Article 2, section 3(a), that signatory countries are "to ensure that any person whose rights

or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 7 of the United Nations International Covenant of Civil and Political Rights provides "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

STATEMENT OF THE CASE

Respondent disagrees with the description of the facts set out in Petitioner's statement of the case. There are two highly charged and different versions of the knifing incident between Mr. Ashker and inmate Fierro which occurred on October 24, 1990. Petitioners contended that the fight involved a death threatening situation, with Ashker slamming Fierro's head into the cement. Ashker testified that it was an ordinary fist fight, with no weapons, no head slamming into the cement, and no threats of death or serious violent injury. The correctional officers testified close to Ashker's version, and two other inmates' eyewitness testimony supported Ashker's version. In addition, the physical evidence belie any claim of head slamming into cement, as Fierro simply suffered several bruises and cuts around his head from punching. The jury accepted Ashker's version of the events, and

rejected the Petitioners' version of the events.

The Court should further note that Fierro and Ashker had an argument just a few days before the October 24, 1990, and which was documented in prison records, and which records were introduced into evidence at the trial. Mysteriously, in the maximum security unit of California's top-level prison (Pelican Bay), Ashker's electronically-controlled cell door opened up at a time when Fierro happened to be present in a common area, collecting his laundry. By prison operations, having two maximum security inmates in the same common area was impermissible and unheard of. The Petitioners have claimed that somehow Ashker "jimmied" his cell door by allegedly placing a shirt over the cell latching mechanism. The evidence was quite clear that the Ashker shooting was part and parcel of one of the uglier aspects of California's prisons. Correctional officers knowingly stage fights between known enemies, and then become a cheering audience for that fight, raising the spectacle of gladiator-type battles in ancient Rome.

Also left out of the Petitioners' statement of the case is the unfortunate medical treatment which Ashker received following the shooting. As a result of the shooting, Ashker's right wrist was shattered by an exploding bullet (a glasier round, which explodes on impact). For some reason, the less lethal 37 millimeter

gas gun which shoots a plastic or wood block (known as "Big Bertha") was not in the vicinity of Brodeur's control office. Brodeur was situated in the control office immediately above the fighting area, and grabbed his Heckler & Koch nine millimeter high powered rifle, and shot Ashker from approximately 10 to 12 feet away, shattering his wrist into mangled pieces. Fierro testified that the shot was actually meant for Fierro's head, and that Ashker saw this, and pushed Fierro's head away from the line of fire, sacrificing his arm in the process, and saving Fierro's life.

The right wrist of Ashker's was mangled and obliterated by Brodeur's shot, and required significant medical attention. Shortly after the initial surgery by an outside physician, Ashker developed an aneurism in his right arm. This aneurism was visible to the naked eye, was in his right wrist area, and showed a clear likelihood that the aneurism was about to burst. The medical procedure to solve this aneurism was quite simple, a matter of simply tying a vein (known as a ligation). The startling evidence on this issue was that Dr. Astorga was specifically told by the outside physician that Ashker needed immediate treatment to the aneurism. Rather than treating that aneurism, Dr. Astorga had Ashker placed in a psych infirmary, where he was placed in a cell with fecal material and urine strewn on the wall. Weeks went by without proper treatment, and Ashker was asleep, chained to his

bed, worried every night that his aneurism would burst and that he would bleed to death during his sleep. Finally the aneurism did burst into a stream of blood, and in the process of applying pressure to stop the bleeding, the attending medical officers rebroke his right wrist. Ashker was then air lifted out of Pelican Bay down to the University of California at Davis facility located in Sacramento, California.

Ashker filed his action for a violation of Civil Rights, 42 U.S.C. Section 1983, alleging that Brodeur and Astorga violated his Eighth Amendment rights to be free from cruel and unusual punishment. Ashker also filed several supplemental state court claims pursuant to 28 U.S.C. Section 1367 (the supplemental jurisdiction statute). Two of the supplemental claims survived pretrial motions: (1) state tort of assault and battery against Brodeur (for the wrongful shooting of Ashker) and (2) state tort claim of medical malpractice against Astorga (for failing to take care of the aneurism and for wrongfully placing Ashker into the fecal and urine-infested psych cell).

Petitioners set forth the Eleventh Amendment as an affirmative defense in their answer to the First Amended Complaint and in their pretrial statement. The Petitioners neither raised the issue in any sort of motion (written or oral) or in any other way. Specifically, the Petitioners never requested the trial court to rule

on the issue.

The jury rendered a verdict in Ashker's favor on the state tort claim of assault and battery for $175,000 and on the state tort claim for medical malpractice in the amount of $50,000, but found against Ashker on his Section 1983 claims.[1] The court entered a judgment in Ashker's favor in the amount of $225,000.

Petitioners Brodeur and Astorga then appealed to the United States Court of Appeals on the basis of Eleventh Amendment immunity. The Ninth Circuit Court of Appeals affirmed the judgment of the District Court, on the basis that Ashker's complaint alleged and his first amended complaint claimed:

> "Each defendant and all of them are being sued individually and in his/her official capacity."

See *Ashker v. Brodeur*, 102 F.3d 392 (9th Cir. 1997), attached as Appendix A to Petitioners' Petition, page 9.

Petitioners have now filed a Petition for Writ of Certiorari to the United States Supreme Court, arguing that the Eleventh Amendment of the United States Constitution bars Ashker's state claims. Ashker opposes the Petition, and submits

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[1]The jury felt that the shooting was a good faith effort to stop the fight.

this opposition and response.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. Clear Supreme Court Precedent Dictates Against the Writ.

The Court of Appeals for the Ninth Circuit in *Ashker v. California Department of Corrections*, 102 F.3d 392 (9th Cir. 1997), based its decision on a clear statement of law given by the United States Supreme Court, and found in *Hafer v. Memo*, 502 U.S. 21, 26 (1991):

> "The phrase 'acting in their official capacities' is best understood in reference to the capacity in which the state officers are sued, not the capacity in which the officer inflicts the alleged injury."

Similarly, in *Scheur v. Rhodes*, 416 U.S. 232, 238 (1974) (a case arising from the massacre of students by the Ohio State National Guard at Kent State), the Court expressly permitted claims under 42 U.S.C. 1983, as well as state tort supplemental claims, similar to those asserted by Ashker here. Though the Petitioners attempt to paint a blurry picture of Eleventh Amendment jurisprudence, the

fact is consistent United States Supreme Court rulings have upheld the overall concept that suing a state official in their individual capacity is permissible under the Eleventh Amendment.

B. Ashker's Claims Do Not Attempt to Regulate the State.

The Petitioners have focused on cases such as *Idaho v. Coeur 'd Alene Tribe of Idaho*, 65 USLW 450, 4542 (June 23, 1997), which itself focused on the fact that the state itself will have a continuing interest in the litigation whenever state policies or procedures are at stake. The Petitioners cite California law, including Title 15, California Code of Regulations, Section 2276, 3279, which authorizes the use of deadly force by correctional officers when necessary to protect the life of another. (Petitioners' brief, page 5, footnote 2)

Respondent points out the critical difference between the Ashker case and the *Coeur 'd Alene Tribe of Idaho* case. At no time was Ashker attempting to change or alter the status of state law. This is not a case to redefine the tort of assault and battery in a prison environment. This legal issue (of the proper legal standard) was uncontroverted, and all parties brought the case to trial on factual grounds (e.g., whether the fight was a life-threatening, head slamming into the cement type, or a roughly evenly matched ordinary prison fight involving fist punches and

wrestling, and no threat of death or serious bodily injury). The primary issue in this case has always been which version of the fight should the jury believe: Ashker's, which was supported by two correctional officers, or Brodeur's. At no time did Ashker attempt to revise, alter or change the state of the law regarding the state tort claim for assault and battery. Instead, Ashker simply submitted the existing state of the law to the Court and to the jury, and gave evidence that under the facts of the case, and under the existing state law, that a state tort had occurred.

This is not a case of Federal Court attempting to regulate or change a state court law. This is not a case of a Federal Court attempting to regulate a prison or other state agency. This was simply a case where a jury heard two competing versions of an incident, and believed Ashker's version of the event. Such a factual finding ordinarily would not be disturbed on appeal, and significantly has not even been raised on appeal. The normal appellate rule is that on appeal the Court should determine that the facts were decided in favor of the prevailing party. These facts, summarized in the above-noted case, clearly show that the jury's verdict was well supported by the evidence, and that there is no reason to disturb that finding upon appeal.

Truce v. United States, 65 U.S.L.W. 4731, 4740 (June 27, 1997), cited by Petitioners, also reiterates the important

aspect of state sovereignty, that states remain "independent and autonomous" within their proper "sphere of authority". Again, Ashker will point out that at no time did he make a request to the trial court to somehow invade California sovereignty and determine what constitutes the state torts of assault and battery or medical malpractice. Both the state torts (assault and battery and medical malpractice) are as old as the hills, are well grounded with jury instructions and uncontroversial case law, which shows a clear body of state law, and clear body of state law defenses, all of which were virtually uncontroverted during the course of trial. Again, as pointed above, the issue was always who did you believe, Ashker's version or Brodeur's version?

The same applies on the medical malpractice claim, Dr. Astorga (who did not appear at the trial) raised the defense that his medical work was up to par and within the scope of care; Ashker had one of the attending physicians from U.C. Davis Medical Center, Dr. Moehring, testify to an expert opinion that the refusal to treat the aneurism promptly was below the standard of care, and constituted medical malpractice. There was no regulating anybody here; there was simply a forcing of round pegs into round holes, which the jury accepted.

C. The Fact That the State Pays Judgments Doesn't Preclude Federal Jurisdiction.

Petitioners cite California Government Code Section 825, which creates a discretionary and not mandatory willingness of the state to pay any judgment against a state official. Solid case law, cited by the Ninth Circuit in *Ashker*, has characterized the indemnity arrangement between a state officer and the state as a "purely intramural arrangement" that should not "turn into an extension of sovereign immunity." *Ashker v. California Department of Corrections*, 112 F.3d 392 (1997) attached to Petitioners' Petition as Exhibit A, page 9; and citing *Denery v. Kupperman*, 735 F.2d 1139, 1147 (9th Cir. 1994). These cases have remained unchallenged.

The Court should consider the odd logic of the Petitioners' position: if the state agrees to pay, it's off the hook. It's a pretty clever way of guaranteeing that you never have to pay, by simply agreeing that you will pay. Such hocus pocus should not be permitted as a way to bootstrap Eleventh Amendment sovereign immunity.

The question should remain focused, as the court points out in *Hafer v. Melo*, 502 U.S. 21, 26 (1991) on comparison between the capacity in which officials are sued, and the capacity in which the official was acting. In a prison setting, we are dealing

with the fact that the person that shot the rifle is a prison guard in a prison uniform using a prison rifle at prison premises, and during the course of his watch. Similarly, the prison medical doctor was at the prison premises, conducting his work as a prison employee, etc.

D. Civil Rights Litigants Cannot Be Deprived of their Day in Federal Court.

Petitioners' suggestion that Ashker had a valid remedy in state court is completely unavailing. (See Petition for Writ of Certiorari, page 6-7). Petitioners point out that under California case law, that there is concurrent jurisdiction to plead and prove federal actions under 42 Section 1983 before California state courts. While this is true, the supremacy clause of the United States Constitution should never be read in such a way that the practical result is to divert a federal court of jurisdiction. To explain this concept, Ashker points out the rather practical circumstance of determining which court to file a federal civil rights claim in. On the one hand, federal courts are preferred because prisons such as Pelican Bay are located in the hinterlands, which is common with prisons. Prisons are often are the largest local employer, largest state tax revenue creator (personnel tax, payroll tax, etc.), raise the values of property significantly (with the influx of salaried correctional officers, etc.) and bring about a series

of beneficial impacts on small cities throughout California. A prisoner litigant may very well believe that he cannot get a fair shake in the small locality, since the local townsfolk who gain the economic benefit the prison brings might not bite the hand that feeds them. Local biases might be more pronounced in some of the southern states. For example, an African-American inmate, for example, would probably never want to be forced to litigate a case for a civil rights claim before the state court of Alabama.

The Petitioners submit that Ashker simply has to litigate the claim in state court, which effectively deprives the federal courts of their jurisdiction. The court should also note that under the United States Supreme Court rulings on civil rights cases (*Whitley v. Albers*, 475 U.S. 312, 319; *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)), requires a showing that a prison official acted with deliberate indifference or manifests an unnecessary and wanton disregard. Prison litigants are well advised to pursue their federal and state claims since state tort claims are typically easier to prove up than federal claims. Here is where, under the Petitioners' present analysis, the whole circumstance falls apart into a complete litigation mess:

A prisoner should never be forced to litigate his federal claim in state court; this would violate the whole spirit of the Federal Civil Rights Act, and would violate the supremacy of

federal law. Under the Petitioners' analysis, a prisoner that wanted to proceed with a federal claim and a state claim would have to file two lawsuits, one in federal court claiming his federal civil rights remedy, and one in state court claiming the state court remedy. This doubling up of litigation would create terrible inefficiencies in the already crowded court dockets in both federal and state court, and would create a ridiculous burden on indigent prisoners. In effect, it would destroy the Civil Rights Acts.

E. The United States Must Live Up to Its Promise to the World Community to Give Civil Rights Victims a Day in Court.

A body of law which this court should consider is a treaty duly signed by the United States, the United Nations International Covenant on Civil and Political Rights (UNTS No. 14668, Vol. 999 (1976), p. 171; 138 Cong. Rec. 54783 (April 2, 1992) (Senate advise, consent and ratification). Article 2, Section 3 (a) of that covenant provides that signatory countries are "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." Article 7 of the International Covenant of Civil and Political Rights provides "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or

punishment." Finally, Article VI, Section 2 of the U.S. Constitution provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land. . ." *See also People of Saipan Ex Rel. Guerrero v. United States Department of Interior*, 502 F.2d 90, 97, 99 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975).

Ashker submits that the treaty has committed the United States toward establishing and ensuring appropriate, realistic and actual (as opposed to theoretical) judicial access and full redress in court. *See* Hanum, Guide to International Human Rights Practice (2nd ed. 1992, University of Pennsylvania Press) p. 239 (providing a practitioner's analysis of the overlay of international human rights in United States Courts); G. Christienson, Using Human Rights Law to Inform Due Process and Equal Protection Analysis, 52 U.Cin.L.Rev. 3 (1983); N. Strossen, Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis, 41 Hastings L.J. 805 (1990) an analysis of different legal strategies to impose the standards set forth in civil rights treaties into United States actions).

Ashker is not attempting here to impose new or different standards of liability from the treaty. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 103-04&n.4 (1976) (in establishing the

"deliberate indifference" standard, the Court examined the United Nations "Standard Minimum Rules for the Treatment of Prisoners").

The concept is that if there has been a violation of a civil or political rights, the United States has obligated itself to the world community to provide a reasonable process and a tribunal to seek redress. It is completely unreasonable, and in violation of the United Nations Treaty, to require a prisoner to litigate his claim in two forums, a federal claim before the United States court and a state claim in state court. Since treaties are the supreme law of the land, any suggestion that the Eleventh Amendment somehow precludes prison actions in federal court concerning state claims must bow to the commitment which the United States Government has made to the world community to provide prisoners with a reasonable process to litigate their claims.

CONCLUSION

Justice delayed is justice denied. The Court may wish to consider the statements of many prisoners in complete bafflement to the ways of the judicial system on one issue that remains blatantly unequal: when the government has a cause against a citizen, they can have him immediately in jail, where he will remain for an extended period of time. The Government's remedy begins on day one when the crime is committed. When the

prisoner is a victim of the Government's conduct, the remedy takes about five years. The Court should be aware that for the most part civil rights attorneys shy away from these cases because they take forever and a day to resolve, and because of all the problems existent in representing prisoners. These problems are condensed in the present action, and show an unfortunate tendency of state prison officials to use their Attorney General's office to endlessly litigate claims which have underpinnings that are really quite simple: Brodeur shot Ashker and he shouldn't have; Astorga should have ligated Ashker's vein and he didn't. It should not take five years to adjudicate such a simple claim.

Based on the foregoing, the Petition for Writ of Certiorari should be denied.

Dated: August 12, 1997

Respectfully submitted,

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